No. 89-356 (2)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

ADELINA CICIRELLO,
Petitioner,

v.

NEW YORK TELEPHONE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF OF RESPONDENT NEW YORK TELEPHONE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Whether the court of appeals correctly affirmed the Order of the district court dismissing petitioner's complaint for the reason that she was without standing to bring an action to enforce a consent decree to which she was not a party.

PARTIES BELOW

Petitioner Adelina Cicirello was the appellant in the Court of Appeals and the plaintiff in the District Court. Respondent New York Telephone Company was the appellee in the Court of Appeals and the defendant in the District Court.

Respondent New York Telephone Company has the following parent companies, non-wholly owned subsidiaries and affiliates:

NYNEX Corporation (parent)

NYNEX Service Company (non-wholly-owned subsidiary).

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STATUTES

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Respondent New York Telephone Company ("NYTC") respectfully requests that the Court deny the Petition for Writ of Certiorari in this matter, seeking review of the judgment of the United States Court of Appeals for the Third Circuit entered on June 8, 1989.

JURISDICTION AND OPINIONS AND JUDGMENTS BELOW

Jurisdiction of the Court is pursuant to 28 U.S.C. § 1254(1). The judgment of the Court of Appeals for the Third Circuit in *Cicirello v. New York Telephone Co.*, No. 89-1100, was entered on June 8, 1989. The Memorandum and Order of the United States District Court for

the Eastern District of Pennsylvania in *Cicirello v. New York Telephone Co.*, Civil Action No. 86-3366, were entered on January 4, 1989. Both are reproduced in petitioner's appendix at A-1 through A-26.

COUNTERSTATEMENT OF THE CASE

A. The Matter In The Courts Below

In this action, filed on June 9, 1986, Petitioner Adelina Cicirello ("Cicirello") has complained that her former employer, Respondent New York Telephone Company ("NYTC"), never paid her benefits which she alleged were due her pursuant to a Consent Decree among the Equal Employment Opportunity Commission ("EEOC") and various other government-plaintiffs and American Telephone and Telegraph Company ("AT&T") and several of its operating companies, including NYTC. Cicirello was not a party to that Consent Decree, and the Consent Decree provided for enforcement only by the parties. The Decree was entered in the United States District Court for the Eastern District of Pennsylvania on May 30, 1974 in *Brennan v. American Telephone and Telegraph Co.*, Civil Action No. 74-1342. The Decree expired by its express terms on May 30, 1979, almost seven years to the day before the commencement of this action in the district court. The Decree is reproduced in respondent's appendix at 1a to 16a.

In her Amended Complaint, Cicirello alleged that, pursuant to the terms of the Consent Decree, NYTC was to upgrade the salaries of individuals against whom it had allegedly discriminated, make payments of back pay to such individuals and institute non-discriminatory promotion policies. Cicirello, a former managerial employee with NYTC, alleged that she was one of the individuals covered by the Consent Decree. She contended that NYTC violated the Decree as it allegedly pertained to her in that it did not pay her back pay, did not afford

her the opportunity of promotion and did not inform her of any program being instituted pursuant to the Consent Decree.

NYTC moved to dismiss Cicirello's claims because by its own terms the Consent Decree expired on May 30, 1979, seven years before Cicirello filed this action. NYTC also argued that Cicirello did not have standing to bring this action. The district court granted NYTC's Motion to Dismiss Cicirello's action in its entirety. Specifically, the district court held that Cicirello did not have standing to enforce a Consent Decree to which she was not a party, and which by its own terms provided for enforcement only by the government-parties to the Decree. (Petitioner's Appendix at A-4 to A-25).[1] The Court of Appeals for the Third Circuit affirmed the order of the district court for the reasons given by the district court. (Petitioner's Appendix at A-2).

B. *Brennan v. American Telephone and Telegraph Co.* And Cicirello's Other Actions Against New York Telephone Company

1. *Brennan v. American Telephone and Telegraph Co., et al.*

On May 30, 1974, the then-Secretary of Labor, the Equal Employment Opportunity Commission and the United States joined as plaintiffs in a nationwide employ-

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[1] During the pendency of this action before the district court, Cicirello filed an Amended Complaint alleging that NYTC fraudulenty concealed the Consent Decree from her. NYTC argued below that not only did Cicirello lack standing, but that her claims were barred by the doctrine of laches because she did not begin the instant action until seven years after she learned of the Consent Decree, and in addition that she failed to plead fraudulent concealment with the specificity required by law. Because they decided that Cicirello did not have standing, the courts below did not reach NYTC's other arguments. (Petitioner's Appendix at A-1 to A-26).

ment discrimination action against American Telephone and Telegraph Company and numerous of its operating companies, including NYTC, in the United States District Court for the Eastern District of Pennsylvania, Civil Action No. 74-1342. The complaint in that action alleged, *inter alia*, that certain pay and promotional practices applicable to managerial employees were discriminatory on the basis of sex. On May 30, 1974, NYTC and the other defendants answered the complaint in that action and filed a proposed Consent Decree which was subsequently approved by the court. That Decree expired by its own terms on May 30, 1979. (1a to 16a).

2. *Cicirello I*

In March, 1981, Cicirello commenced an action against NYTC in the United States District Court for the Southern District of New York alleging, *inter alia*, that NYTC had violated the Consent Decree. *Cicirello v. New York Telephone Co.*, No. 81 Civ. 1493-CLB (S.D.N.Y.) (hereinafter "*Cicirello I*"). On June 19, 1981, that court issued an order dismissing Cicirello's complaint, holding, *inter alia*, that "Necessary proceedings, if any, to enforce the 'Consent Decree' of the United States District Court for the Eastern District of Pennsylvania made in 1974 under docket number 74-1342, should be taken in that Court." (17a to 18a).

3. *Cicirello II*

Rather than heeding the order of the federal district court for the Southern District of New York, Cicirello commenced an action in June, 1982 in the New York Supreme Court, Nassau County, alleging that NYTC had fraudulently violated the Consent Decree. *Cicirello v. New York Telephone Co.*, No. 13251-1982 (N.Y. Sup. Ct. —Nassau County) (hereinafter "*Cicirello II*"). On De-

cember 6, 1982, the New York Supreme Court issued an order dismissing Cicirello's complaint for the same reasons as set forth in the opinion in *Cicirello I.* (19a to 20a). The decision of the New York Supreme Court subsequently was affirmed by the Appellate Division, Second Department. *Cicirello v. New York Telephone Co.*, 97 A.D.2d 990, 468 N.Y.S.2d 962 (1983).

4. *Cicirello III*

On or about April 22, 1983, Cicirello again commenced an action against NYTC in the United States District Court for the Southern District of New York. *Cicirello v. New York Telephone Co.*, C.A. 83-Civ.-3114 (S.D.N.Y.) (hereinafter "*Cicirello III*"). In her complaint, Cicirello alleged that NYTC retaliated against her for filing a charge of discrimination with the Equal Employment Opportunity Commission by allegedly intimidating and harassing her and demoting her. The court granted NYTC's motion for summary judgment holding, *inter alia*, that Cicirello had become ill and left work before any demotion took effect. (21a to 27a). The United States Court of Appeals for the Second Circuit affirmed in an order entered March 5, 1985. *Cicirello v. New York Telephone Co.*, No. 84-7935 (2d Cir. March 5, 1985).

SUMMARY OF REASONS FOR DENYING THE WRIT

The standard for granting *certiorari* has not been met in this case because the courts below correctly applied the rule that a consent decree is to be interpreted in accordance with its terms. The courts below held that the decree in question did not contemplate enforcement by non-parties. There is no need to alter this rule in light of the Court's recent decision in *Martin v. Wilks*, 109 S. Ct. 2081 (1989), because, unlike the decree in that case, the decree in question did not operate to deprive Cicirello of any rights.

REASONS FOR DENYING THE WRIT

I. Certiorari Should Be Denied Because The Courts Below Correctly Decided That Cicirello Lacked Standing To Enforce The Consent Decree Because She Was Not A Party To The Decree And Because The Decree Did Not Provide For Enforcement By Non-Parties.

The district court dismissed Cicirello's Amended Complaint on the specific ground that Cicirello had no standing to enforce a consent decree to which she was not a party. The district court correctly held, and the Third Circuit correctly affirmed, that under the terms of the Consent Decree only the parties to the Decree had standing to enforce its provisions. The parties to the Consent Decree at issue here were the Secretary of Labor, the Equal Employment Opportunity Commission, the United States of America, the American Telephone and Telegraph Company and several regional Bell operating companies. Cicirello was not a party to the Consent Decree. The courts below properly relied on this Court's preeminent statement of the law regarding standing to enforce consent decrees. In *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 750 (1975), this Court held:

> [A] well-settled line of authority from this Court establishes that a consent decree is not enforceable directly or in collateral proceedings by those who are not parties to it even though they were intended to be benefited by it.

As the district court below pointed out, the rationale for this rule was correctly stated by the dissent in the Ninth Circuit's decision in *Blue Chip Stamps*. In that dissent, Judge Hufsteadler pointed out that allowing nonparties to a consent decree to sue increases potential exposure to litigation and impairs the public policy interests favoring the settlement of litigation. *Manor Drug Stores v. Blue Chip Stamps*, 492 F.2d 136, 144 n.3 (9th Cir. 1973) (Hufsteadler, J., dissenting).

Cicirello has attempted to distinguish *Blue Chip Stamps* from her own case by arguing that there are stronger policy reasons for allowing standing to a non-party to a civil rights consent decree, as opposed to one in a securities case. In *Blue Chips Stamps*, a plaintiff who was discouraged from purchasing stock by the wrongful action of the defendant in violation of the federal securities laws attempted to recover by enforcing a consent decree which redressed the defendant's wrongful acts. *Blue Chip Stamps* is factually analogous to Cicirello's case except that the plaintiff was seeking to enforce rights under a different statute. Cicirello has not explained why the "remedial purpose" of Title VII should be distinguished from the "remedial purpose" of the federal securities laws.

The primary rule for deciding how to interpret a consent decree was announced by this Court in *United States v. Armour & Co.*, 402 U.S. 673 (1971). In that case, this Court wrote, "the scope of a consent decree must be discerned within its four corners, and not by reference to what might satisfy the purposes of one of the parties to it . . . [or by what] might have been written." 402 U.S. at 682. In *United States v. Armour & Co.*, this Court recognized that consent decrees are generally entered into only after careful negotiation has produced an agreement on *precise terms*. Because the parties waive their rights to litigate the issues covered by the consent decree, this Court has held that such a decree must be construed exactly as it is written. 402 U.S. at 681-82.

Thus, according to *Armour & Co.*, where a consent decree contains specific provisions as to who may enforce the decree, a court determining how to enforce the decree is limited to interpreting those provisions. This rule has been applied in several cases involving interpretation of enforcement provisions of civil rights consent decrees,

and the question of standing to enforce those decrees.[2] For example, the Eighth Circuit interpreted a provision of an employment discrimination consent decree which allowed "plaintiff United States" to enforce noncompliance to mean that third party beneficiaries of the decree had no standing to sue. *Rule v. International Ass'n of Bridge, Structural and Ornamental Ironworkers*, 568 F.2d 558, 565 n.10 (8th Cir. 1977), *affirming in pertinent part Rule v. International Ass'n of Bridge, Structural and Ornamental Iron Workers*, 423 F. Supp. 373, 381 (E.D. Mo. 1976). *Accord Hameed v. International Ass'n of Bridge, Structural and Ornamental Iron Workers, Local Union No. 396*, 637 F.2d 506 (8th Cir. 1980) (reaching same result in a case interpreting the same consent decree). Similarly, in *EEOC v. International Union of Operating Engineers, Local Union #3*, 416 F. Supp. 728, 732 (N.D. Cal. 1975), the district court, relying on the rule that relief under a consent decree must be based on language that is explicitly within the four corners of the decree, held that private plaintiffs who were not parties to the consent decree had no standing to enforce it.

The enforcement language of the Consent Decree in this case, relied on by the district court, provided that "[t]he *government plaintiffs* shall endeavor to coordinate their efforts to assure compliance with this Decree," and "[t]he *government* will promptly notify the Bell Company involved and A.T.&T. of any problems of noncompliance with this Decree which they believe warrant investigation.

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[2] The *Armour & Co.* rule was applied by this Court in an employment discrimination consent decree context in *Firefighters Local Union No. 1784 v. Stotts*, 467 U.S. 561, 574 (1984). There, the Court confirmed that even in the context of enforcement of an employment discrimination consent decree, the express provisions of that decree had to be given effect. 467 U.S. at 574. The Court held that the district court *could not* rely on the broad remedial purposes of Title VII to improperly modify the consent decree by issuing an injunction that exceeded the scope of the decree. 467 U.S. at 572-76.

Such Company will be given 60 days to investigate the complaint and conciliate with *the government* regarding the taking of any appropriate corrective action. At the end of this period, *the government*, if not satisfied, may seek an appropriate resolution of the question by the Court." (Petitioner's Appendix at A-21 to A-22) (emphasis added).

In discussing the enforcement language of the Consent Decree as it related to individual employees, the district court properly noted,

> [To] the extent that the Decree envisaged pursuit by individual employees of their own remedies, it seems apparent that such cases were not seen as arising under the Agreement. Thus Section I.B.I.B. provides: "Acceptance by any person of individual relief ordered in Part A [promotion and back pay remedies sought by plaintiff Cicirello] shall constitute a waiver and release by such person of any claims for alleged violations of Title VII of the Civil Rights Act of 1964, . . . Executive Order 11246, . . . or any applicable state fair employment practice laws or regulations based upon occurrences prior to the date of this Decree as respects [sic] those issues dealt with in the Decree." The Decree evidently contemplated *separate* litigation of private causes of action by plaintiffs who did not, whether because of ineligibility, error by the parties in enforcement, actual fraudulent exclusion, or other reason, directly benefit from its provisions.

(Petitioner's Appendix at A-22 to A-24) (emphasis in original). The district court correctly reasoned that this language provided for only the government to seek judicial enforcement of the Decree, and envisioned pursuit of other remedies under the civil rights laws by individual employees who did not receive relief under the Decree, separate and apart from the government's enforcement of the agreement. (Petitioner's Appendix at A-22 to A-24).

Although some courts have not applied *Blue Chip Stamps*' general rule, that only parties to a consent decree may enforce its terms, to non-party beneficiaries of consent decrees affecting civil rights, these cases acknowledge the general rule that a consent decree should be construed as a contract. In the absence of clear enforcement language for the court to interpret, these cases have relied on general principles of contract which would permit third-party beneficiaries to sue. For example, in *H.F. Allen Orchards v. United States*, 749 F.2d 1571 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), relied on by Cicirello for its holding that certain farmers had standing to enforce a consent decree, the court recognized that the *Armour* rule applies. "A consent decree is construed as a contract for enforcement purposes, and aids to construction, such as circumstances surrounding formation of the decree and the technical meanings words may have had to the parties, may be considered." 749 F.2d at 1574.

Cicirello has cited five cases for the proposition that a civil rights consent decree may be enforced by a non-party. However, these cases are either inapposite or have specific factual circumstances which led the courts to so interpret the consent decrees at issue. For example, in *South v. Rowe*, 759 F.2d 610 (7th Cir. 1985), the consent decree provided for a prison to maintain certain law library services. The inmate-party who sought the consent decree was no longer an inmate when the decree was finally negotiated and signed. The decree specifically provided, however, that the court was to retain jurisdiction to enforce the decree for a two-year period. Thus, the court reasoned that the only explanation for a continued enforcement period, after the inmate-party to the decree was released from prison, was for the benefit of current inmates. The court specifically relied on the reasoning that a consent decree is a form of contract and

that, where the intent of the parties as expressed in the language of the decree is ambiguous, a court may consider extrinsic evidence as to the intent of the parties. 759 F.2d at 611-13.

The farmers who sought to enforce the consent decree at issue in *H.F. Allen Orchards v. United States*, 749 F.2d 1571, 1573 (Fed. Cir. 1984), *cert. denied*, 474 U.S. 818 (1985), were dues-paying members of an association which was a party to the decree and which had sought the decree on its members' behalf. 749 F.2d at 1573. The court held that the party was thus only a surrogate for the aggregation of its members. Also, the decree provided that the government should make certain information available to the farmers and that they would pay the government directly for this information. The court also relied on this fact in interpreting the decree to provide for enforcement directly by the farmers. 749 F.2d at 1576.

In *Jones v. Local 520, Int'l Union of Operating Engineers*, 603 F.2d 664 (7th Cir. 1979), *cert. denied*, 444 U.S. 1017 (1980), the complaint stated a cause of action under 42 U.S.C. § 1981, as well as a claim under the consent decree. The appeals court relied principally on the right of plaintiffs to sue for deprivation of their civil rights under 42 U.S.C. § 1981, when it remanded the case to the district court, and not on an interpretation of how the consent decree should be enforced. The district court specifically noted this fact in its decision in the case on remand. *See Jones v. Local 520, Int'l Union of Operating Engineers, on remand*, 524 F. Supp. 487, 490 (S.D. Ill. 1981). In *Perdue v. Roy Stone Transfer Corp.*, 690 F.2d 1091 (4th Cir. 1982), the plaintiff who sought to enforce a private conciliation agreement reached among her employer, herself and the EEOC under the EEOC's statutory conciliation authority, 42

U.S.C. § 2000e-5(b), *was actually a party to that agreement.* In *Perdue*, the court also found it significant that the plaintiff forbore to press her Title VII claims because of her reliance on the consent decree. If the court did not allow her to sue to enforce her settlement agreement, she would forever lose her right to sue in federal court, a result the court found would be inequitable. However, as discussed in Section II, *infra*, Cicirello did not lose her right to sue. The Consent Decree at issue specifically preserved Cicirello's right to bring a Title VII claim. Indeed, she brought such a claim in *Cicirello III*, and NYTC was granted summary judgment. (21a to 27a).

Finally, in *Byrd v. Long Island Lighting Co.*, 565 F. Supp. 1455 (E.D.N.Y. 1983), the court held, without referencing or attempting to distinguish this Court's precedent with respect to third party enforcement of consent decrees, that a member of a class designated in a private EEOC conciliation agreement could seek judicial enforcement of that agreement. Even ignoring the fact that the court admitted it could find no judicial support for its specific holding, the agreement at issue in *Byrd* was a private EEOC conciliation agreement (as was the agreement in *Perdue*), not a consent order entered by the court. 565 F. Supp. at 1469-70.

Cicirello's arguments ignore the fact that the fundamental principle to be applied in this case is that consent decrees should be interpreted according to their precise terms. Because the courts below correctly ruled that the decree at issue here did not provide for enforcement by non-parties, and that Cicirello therefore had no standing to enforce the decree, Cicirello's Petition for *Certiorari* should be denied.

II. The Court's Decision In *Martin v. Wilks* Does Not Affect The Lower Courts' Disposition Of Cicirello's Case.

Cicirello argues that the Court's recent decision in *Martin v. Wilks*, 109 S. Ct. 2180 (1989), "suggests that non-parties affected by [a] consent decree have standing to seek relief with respect to matters concerning such consent decrees." (Petition at p. 12). However, *Martin v. Wilks* presented a different question to the Court than that posed by Cicirello. In *Martin v. Wilks*, white firefighters claimed that they were being deprived of their legal right not to be subject to discrimination by virtue of employment decisions made under consent decrees intended to benefit black firefighters. The white firefighters were not *beneficiaries* of the decrees. Rather, they sought to collaterally *challenge* enforcement of the consent decrees because they allegedly resulted in a violation of their statutory rights. The Court decided that the white firefighters were entitled to bring their own separate discrimination claims, challenging the employment decisions taken pursuant to the consent decrees.

Cicirello argues that, like the respondents in *Martin v. Wilks*, she was a "stranger" to the consent decree at issue (Petition at p. 23), yet this argument is simply inconsistent with her argument that she was an intended beneficiary of the *Brennan v. American Telephone & Telegraph Co.* consent decree. As an intended beneficiary, Cicirello is in a completely different position than the *Martin v. Wilks* respondents. The decisions made pursuant to the consent decrees in *Martin v. Wilks* acted to deprive those respondents of their legal rights. The district court in *Martin v. Wilks* had ruled that the respondents in that case could not pursue separate statutory discrimination claims, where such claims had the effect of attacking decisions made under the consent decrees. This Court's decision in *Martin v. Wilks* operated to permit plaintiffs to enforce their statutory rights.

On the contrary, Cicirello seeks to enforce rights which she claims were *created* by the Consent Decree in *Brennan v. American Telephone & Telegraph Co.* That decree expressly provided for the *enforcement* of Cicirello's statutory rights, and in addition specifically *preserved* Cicirello's right to bring her own separate Title VII action, as long as she had not accepted the individual relief provided by the Consent Decree. The Consent Decree specifically contemplated that if individuals sought their own remedies, these cases would arise pursuant to separate claims brought by the individuals under Title VII, as the district court noted in its opinion. (Petitioner's Appendix at A-22 to A-23).

Cicirello was aware of her rights under Title VII and of the EEOC's administrative machinery for enforcement of those rights. (*See* Cicirello's Affidavit, 28a to 34a). Indeed, Cicirello brought her own action against NYTC under Title VII, based on a theory of constructive discharge, and New York Telephone Company was granted summary judgment in that action. (*See Cicirello III*, 21a to 27a).

Clearly, Cicirello's petition does not present an issue which needs to be re-evaluated in light of the Court's *Martin v. Wilks* decision. There is no need in this case, involving a consent decree which, in addition to creating an additional mechanism for enforcement of Cicirello's statutory rights, preserved Cicirello's right to bring her own cause of action, to allow a collateral enforcement proceeding by a non-party to the Decree.

CONCLUSION

The courts below correctly held that Cicirello does not have standing to enforce a Consent Decree to which she was not a party. This Court's recent decision in *Martin v. Wilks* dealt with the right of a person to collaterally attack a consent decree where that consent decree allegedly interfered with that person's statutory rights rather than, as here, where a non-party seeks to enforce rights allegedly created by a consent decree. Consequently, that decision does not justify re-evaluation of the decisions below. Therefore, there are no "special and important reasons," pursuant to Supreme Court Rule 17, for granting *certiorari* in this case, and the Petition should be denied.

Respectfully submitted,

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Dated: September 27, 1989

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APPENDIX

APPENDIX

APPENDIX

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 74-1342

PETER J. BRENNAN, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR,

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

and

UNITED STATES OF AMERICA,

Plaintiffs,

v.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, NEW ENGLAND TELEPHONE AND TELEGRAPH COMPANY, THE SOUTHERN NEW ENGLAND TELEPHONE COMPANY, NEW YORK TELEPHONE COMPANY, NEW JERSEY BELL TELEPHONE COMPANY, THE BELL TELEPHONE COMPANY OF PENNSYLVANIA AND THE DIAMOND STATE TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF MARYLAND, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF VIRGINIA, THE CHESAPEAKE AND POTOMAC TELEPHONE COMPANY OF WEST VIRGINIA, SOUTHERN BELL TELEPHONE AND TELEGRAPH COMPANY, SOUTH CENTRAL BELL TELEPHONE COMPANY, THE OHIO BELL TELEPHONE COMPANY, CINCINNATI BELL INC., MICHIGAN BELL TELEPHONE COMPANY, INDIANA BELL TELEPHONE COMPANY, INCORPORATED, WISCONSIN TELEPHONE COMPANY, ILLINOIS BELL TELEPHONE COMPANY, NORTHWESTERN BELL TELEPHONE COMPANY, SOUTHWESTERN BELL TELEPHONE COMPANY, THE MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY, PACIFIC NORTHWEST BELL TELEPHONE COMPANY, THE PACIFIC TELEPHONE AND TELEGRAPH COMPANY AND BELL TELEPHONE COMPANY OF NEVADA,

Defendants.

CONSENT DECREE

The Equal Employment Opportunity Commission (hereinafter, EEOC, the Secretary of Labor (hereinafter, the Secretary), and the United States of America having filed their Complaint herein, the EEOC pursuant to Sections 706(f)(1) and 707(e) of Title VII, of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e *et seq.* (hereinafter, Title VII), the Secretary pursuant to Sections 6(d), 15(a)(2) and 17 of the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. §§ 201 *et seq.* (hereinafter, the Equal Pay Act), and the United States pursuant to Executive Order 11246, as amended (hereinafter, the Executive Order), and the Defendants having filed their Answer denying the allegations in the Complaint,[1] and the parties having waived hearings and findings of fact and conclusions of law, the following order is entered without any admission by any of the Defendants or finding by the Court of any violation by any of the Defendants of any of the above-mentioned statutes or Executive Order, or any regulations adopted pursuant thereto.

Now, therefore, it is ORDERED, ADJUDGED AND DECREED as follows:

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[1] Defendants assert that venue in the present action is improper as to all Defendants except the Long Lines Department of the American Telephone and Telegraph Company, and The Bell Telephone Company of Pennsylvania. However, all Defendants have waived objections to venue for the limited purpose of the entry of this Decree. By submitting to the jurisdiction of this Court and waiving objections to the venue of this action solely for the purpose of the entry of this Decree, all Defendants preserve their rights to object to the appropriateness of jurisdiction and venue in all other actions or as to any other claims brought in this or any other federal judicial district.

PART A

I. MANAGEMENT PROMOTION PAY PLAN

Definitions:

1. "Salary Band" is a category with a stated minimum and a stated maximum salary rate which includes a number of management positions determined by the respective Company to be of comparable value for compensation purposes.

2. "Salary Zone" is a geographic area of a Company's operation within which compensation rates are separately determined.

3. "Most favored sex" means the sex having the higher average rate of pay on promotions to a salary band (or job for back pay determinations) during the respective study periods (July 1, 1972 to June 30, 1973;[2] or June 1, 1972 through May 31, 1974).

4. "Least favored sex" means the sex having the lower average rate of pay on promotions to a salary band (or job for back pay determinations) during the study period.

5. "Through Promotion" limits the employees included in the calculation required to establish a minimum entry rate, and the employees entitled to back pay pursuant to Section II, C., below, to those employees entering a management band as a result of a promotion[3] from any position or

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[2] For establishing the minimum entry rate for each salary band, the study period with respect to New England Telephone and Telegraph Company shall be January 1, 1973 to June 30, 1973.

[3] In Wisconsin Telephone Company and The Ohio Bell Telephone Company "promotion" includes only reassignments which entitle the employees to a promotional salary increase consistent with the promotion pay practices of those Companies.

band with a lower maximum rate.[4] Neither calculation shall include employees entering as new hires, entering through lateral transfer, or temporarily promoted.

6. "Temporarily Promoted" means a promotion in which the employee does not assume all the duties and responsibilities of the assigned position or a promotion for a specific period of time which is not a permanent assignment.

A. In each Operating Telephone Company, A.T. & T. Long Lines, and A.T. & T. General Departments, job evaluation is the primary vehicle by which management positions (excepting certain professional or other specialized positions) are classified into various salary bands.[5]

B. No later than June 30, 1975, each Company will have completed its job evaluation study in management levels 1 and 2 (as described in A above) and shall have placed each position in the salary band for which it qualifies, based on the evaluation results. Upon placement in a new salary band, salaries of employees below the minimum (dollar) entry rate, as described below, of the band will be brought to the minimum (dollar) entry rate.

C. Within each Operating Telephone Company, A.T. & T. Long Lines, and A.T. & T. General Departments, a minimum (dollar) entry rate shall be established for each salary band in management levels 1 and 2

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[4] Maximum rates means the highest attainable salary rate for completely satisfactory performance and does not include salary rates attainable only for outstanding performance.

[5] Defendants note that their purpose in establishing minimum entry rates by salary bands rather than jobs is based on salary administration and personnel reasons, and Defendants deny that these bands are required for compliance with the Equal Pay Act, Title VII or the Executive Order.

for each salary zone, based on a study of entry rates paid in all salary zones (converted into percentages of zone maximum rates at the time of promotion) to the most favored sex entering that salary band through promotion during a study period between July 1, 1972 and June 30, 1973. The minimum (dollar) entry rate for each salary band shall equal the average salary rate of the most favored sex who entered the band through promotion during the study period of July 1, 1972 to June 30, 1973. The minimum entry rate shall be a separate dollar amount for each salary zone. Where fewer than five employees of each sex were promoted to a salary band during the study period, the study period shall be expanded in the following manner so that the base of employees studied shall include five employees of each sex: (1) first, to post-study periods in chronological order up to the date of this Decree; and (2) if necessary, to pre-study periods in reverse chronological order, not to exceed two years prior to July 1, 1972. Where no reasonable sex-mix (minimum of five of each sex) can be obtained by expanding the base period, the minimum entry rate for any salary band shall be established as described above, providing at least one employee of each sex was promoted to the band in question. When a study discloses no promotion of employees of one sex, the minimum entry rate shall be established at 85% of the maximum rate for the salary zone expressed in dollars. In no instance shall the minimum (dollar) entry rate established for a salary band by any method exceed 85% of the maximum rate for the salary zone.

D. In each Operating Telephone Company, A.T. & T. Long Lines, and A.T. & T. General Departments, salaries of employees below the minimum (dollar) entry rate in any salary band in management levels

1 and 2 shall be adjusted upward to the minimum rate as of the first day of the first full calendar month following the date of this Decree.

E. In each Operating Telephone Company, A.T. & T. Long Lines and A.T. & T. General Departments, no employee entering a given salary band in management levels 1 and 2 through promotion in the future shall be paid a salary less than the minimum (dollar) entry rate, upon promotion to that band.

F. When and if a salary structure (the combined salary bands in a management level) in management levels 1 and 2 are revised in any Company covered by this Decree, the minimum (dollar) entry rates for the salary bands in the revised structure shall conform to the greatest extent possible with the pattern of rates established in the salary bands existing on the date of this Decree. The minimum (dollar) entry rate for each new salary band shall be at least as high as the minimum rate of the band in which the majority of the employees in the new band were previously located, subject to the 85% limitation described in C above. Minimum (dollar) entry rates established under this Decree shall not be decreased in corresponding salary bands in the revised structure as a result of such restructuring.

G. Except as specifically modified by the Management Promotion Pay Plan set forth herein, the management pay practices of any Operating Telephone Company, A.T. & T. Long Lines or A.T. & T. General Departments are not affected by this Decree.

Exceptions:

1. The minimum (dollar) entry rate for the applicable salary band and salary zone need not apply to an employee initially hired into management levels 1 or 2. However, within two

years from an employees' initial employment in management levels 1 or 2, a Company shall compensate each such employee at least at the minimum rate established for the applicable salary band and salary zone.

2. In The Ohio Bell Telephone Company, Illinois Bell Telephone Company, the Long Lines Department of the American Telephone and Telegraph Co., and The Pacific Telephone and Telegraph Company (and Bell Telephone Company of Nevada), which have implemented management promotion pay plans which the parties agree are at least as favorable to employees as the promotion pay plan set forth above, continued use of their respective plans complies with the requirements of Title VII, the Equal Pay Act, and the Executive Order, provided that either their own promotion pay plan, a combination of their own plan and the plan set forth above, or the plan set forth above, is applicable to management levels 1 and 2.

3. The minimum (dollar) entry rate for the applicable salary band and salary zone shall not apply to employees temporarily promoted; provided, however, that where an employee has occupied a position for more than sixty calendar days, the promotion shall no longer be considered temporary and the employee shall be brought to the applicable minimum entry rate.

II. BACK PAY

In each Operating Telephone Company, A.T. & T. Long Lines and A.T. & T. General Departments, back pay awards shall be granted to certain employees under this Decree (limited as noted, Section II, E, below). Such awards shall be limited to situations and time periods in

which employees in management levels 1 and 2, of both sexes have been engaged in performance of equal work; that is, jobs involving substantially the same duties, the performance of which require equal skill, effort and responsibility, and which are performed under similar working conditions.

A. Such awards shall be based on an examination in each Company of entry rates in positions within the same salary band which have the same first two digits of Bell System status codes and the same Bell System job duties codes (as revised and verified by each Company) on a Company-wide basis,[7] during the period from the first day of the first full calendar month following the date of this Decree to two years prior to that date. Within 90 days from the date of this Decree, each Company shall furnish the government Plaintiffs with a list of all positions in management levels 1 and 2, which are in the same salary bands, have the same first two digits of the Bell System status codes and the same Bell System job duties code, and which the Company contends do not involve "equal work," as defined above. For each group of such management positions on the list furnished to the government Plaintiffs, each Company will provide a summary of the bases on which it has determined that such positions do not involve "equal work." The government Plaintiffs shall, within 60 days from the receipt of such lists, review the listings and conduct such investigations as they deem appropriate to verify the information provided and the accuracy of the Company's determination. In

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[7] Defendants note that their agreement herein to pay back pay and establish minimum entry rates on a "Company-wide" basis by Defendants is based on salary administration and personnel reasons and Defendants deny that jobs in different "establishments" or "locations" may be compared under the Equal Pay Act, Title VII, or the Executive Order.

the event of a disagreement as to any determination made by any Company, the government Plaintiffs shall follow the procedure provided in PART B, Section II, C, below. As to any management positions for which the procedures of PART B, Section II, C, below are invoked, the payment of back pay shall be made within 30 days of the final resolution of such procedures.

B. Each Company shall calculate a minimum (dollar) entry rate for each job (as determined in Section II, A, above) into which employees of both sexes have been promoted, in management levels 1 and 2. The calculation shall be made in the same manner as provided in Section I, C, above. The minimum rate shall be a separate (dollar) amount for each salary zone.

C. Any employee who entered a job in management levels 1 or 2 through promotion, who was a member of the least favored sex as defined above, and who was employed in such a job after two years prior to the first full calendar month following the entry of this Decree at a rate of pay below the minimum (dollar) job entry rate calculated for the job pursuant to Section II, B, above, shall receive an amount equal to the difference between the minimum job entry rate for the applicable job and the individual's salary rate(s).

D. Back pay awards shall be granted for the period of time such employee has been performing a job which qualifies for an award since two years prior to the first day of the first full calendar month following the entry of this Decree.

E. Back pay awards for The Pacific Telephone and Telegraph Company (including Bell Telephone Company of Nevada), The Mountain States Telephone and Telegraph Company, The Ohio Bell Telephone Com-

pany, the Long Lines Department of the American Telephone and Telegraph Company, and Illinois Bell Telephone Company, which have introduced alternative entry rate plans shall be limited to the period of time and management level(s) to which such plans did not apply during the period provided in C and D above.

PART B

I. EFFECT OF DECREE

A. As to the specific issues identified in the Complaint and Decree, compliance with the terms of this Decree resolves all existing questions among the parties of the Bell Companies' compliance, for acts or practices occurring prior to the date of this Decree, with the requirements of Title VII of the Civil Rights Act of 1964, as amended, the Equal Pay Act of 1963, as amended, and Executive Order 11246, as amended. Moreover, compliance with the terms of the Decree in the future will constitute compliance with such laws, orders, and regulations as respects those issues specifically dealt with in the Decree.

B. Acceptance by any person of individual relief ordered in PART A, Section II of this Decree shall constitute a waiver and release by such person of any claims for alleged violations of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 1981, 1983, Executive Order 11246, as amended, or any applicable state fair employment practice laws or regulations based upon occurrences prior to the date of this Decree as respects those issues dealt with in the Decree.

C. As to the specific issues resolved in this Decree, the parties agree to continue the procedures and agreements implemented pursuant to PART B, Section I, A-B, of the Memorandum of Agreement of January 18, 1973, entered between these same parties with respect to non-management employees.

D. The Plaintiffs further agree:

1) That they will not, in any claim action or proceeding (including rate cases), involving any of the Defendants, initiate, encourage, fund, intervene in support of or advocate by *amicus* brief or otherwise, a position inconsistent with this Decree.

2) That EEOC will advise its Regional and District offices, as well as state and local agency grantees, and the Department of Labor will advise its Regional and District offices and contract compliance agencies, that the Decree will bring the Bell Companies into compliance with Title VII, the Equal Pay Act, and the Executive Order requirements as to the specific issues identified in the Decree and that, to the limit of EEOC's contractual power to insure such a result, such Companies shall not be the subject of enforcement programs funded by EEOC, as to the matters covered herein.

3) That any actions taken by EEOC Regional or District offices or Department of Labor Regional or District offices or OFCC field offices which any Bell Company believes to be inconsistent with the terms of this Decree may be brought to the attention of the national headquarters of the EEOC, Department of Labor, or OFCC, as appropriate, and such national headquarters shall become the party with whom such Bell Company may resolve such compliance issues.

II. COMPLIANCE PROCEDURES

A. The government plaintiffs shall endeavor to coordinate their efforts to assure compliance with this Decree and shall develop such procedures as may be appropriate to this end.

B. As to the issues resolved in this Decree, the parties agree that Defendant Companies shall provide the following reports within 8 months of the date of this Decree:

1) By each Company, a list of employees by race and sex paid back wages under PART A, Section II, and the amount paid to each;

2) By each Company, a list of employees by race and sex accorded wage raises pursuant to PART A, Section I, D.

Nothing in this Decree shall limit the right of the Department of Labor to make investigations under Section 11 of the Fair Labor Standards Act nor the right of EEOC to investigate charges pursuant to Section 706(b) of Title VII.

C. The government will promptly notify the Bell Company involved and A.T. & T.[9] of any problems of noncompliance with this Decree which they believe warrant investigation. Such Company will be given 60 days to investigate the complaint and conciliate with the government regarding the taking of any appropriate corrective action. At the end of this period, the government, if not satisfied, may seek an appropriate resolution of the question by the Court.

III. DURATION OF THE DECREE

A. The Court retains jurisdiction of this action for entry of such orders as are necessary to effectuate the provisions of this Decree. The term of this Decree shall

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[9] The responsibility of A.T.&T., apart from responsibility for the compliance of its own departments, shall be limited to: (1) in case of an irreconcilable conflict between the government and an individual Bell Company, to use its good offices to aid in achieving a resolution of such conflict; (2) the provision of advice to its associated telephone companies as to the meaning of the Decree and the procedures for compliance; and (3) the coordination of reports required by PART B, Section II, B.

be five years from this date, but as to the specific issues dealt with herein, the Defendants are permanently enjoined from violating the provisions of the Equal Pay Act, Title VII, and the Executive Order. Upon certification to this Court that the payment of back wages ordered in PART A, Section II, has been made, that portion of this Decree will be dissolved as having been satisfied. Defendants waive none of their rights to move for dissolution or modification of this Decree at any time in addition to those specifically provided for in Subsection B below.

B. Opinion letters have been issued by the General Counsel of EEOC and the Wage and Hour Administrator and are attached hereto as Exhibits A and B, respectively. Should either opinion or portion thereof be withdrawn or overruled, the Plaintiffs will, at the request of the Defendant(s) affected by such withdrawal or overruling, join such Defendant(s) in moving the Court to dissolve any portion of the Decree which involves the issue or issues with respect to which the opinion letter has been withdrawn or modified, and to strike any portion of the pleadings in this action relevant thereto, and such motion shall be granted.

SO ORDERED:

/s/ A. Leon Higginbotham
Judge
United States District Court

Consent to the entry of the foregoing Decree is hereby granted.

AMERICAN TELEPHONE AND TELEGRAPH COMPANY, for itself and on behalf of its associated telephone companies as set forth herein.

By: /s/ Charles Ryan
CHARLES RYAN

/s/ Clark G. Redick
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J. Stanley Pottinger
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James S. Angus
Attorney

Robert E. J. Curran
United States Attorney

UNITED STATES DEPARTMENT
OF JUSTICE

Endorsement

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81 Civ. 1493-CLB

ADELINA F. CICIRELLO,
Plaintiff

v.

NEW YORK TELEPHONE COMPANY,
Defendant

The within motion is granted and this action is dismissed.

Necessary proceedings, if any, to enforce the "Consent Decree" of the United States District Court for the Eastern District of Pennsylvania made in 1974 under docket number 74-1342, should be taken in that Court.

Failure to have received a "right to sue" letter from the EEOC precludes jurisdiction in this Court to entertain a claim founded on Title VII of the Civil Rights Act of 1964. That an official of that agency was derelict in his duty to plaintiff, if true, is unfortunate, but does not authorize this Court to waive the jurisdictional requirement.

Absent diversity or the presence of a federal claim supplying pendent jurisdiction, this Court will not hear claims pleaded under the New York Human Rights Law.

In her memorandum of law submitted on this motion, plaintiff seeks leave to amend her complaint to allege a claim within 42 U.S.C. § 1981 or 1983. No purpose would be served by any such amendment under the relevant facts of this case.

The Clerk shall enter a final judgment dismissing this action without costs and without prejudice to plaintiff's rights, if any, under the Consent Decree of the United States District Court for the Eastern District of Pennsylvania.

So Ordered.

Dated: New York, New York
June 19, 1981

/s/ Charles L. Brieant
CHARLES L. BRIEANT
U. S. D. J.

SHORT FORM ORDER

SUPREME COURT—STATE OF NEW YORK

Present: HON. HENDERSON W. MORRISON, Justice

SPECIAL TERM, PART 1
NASSAU COUNTY

Index Number 13251, 1982

Motion Date Sept. 29, 1982

Motion Cal. Number 29

ADELINA F. CICIRELLO,
Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,
Defendant.

The following papers numbered 1 to 10 read on this motion

Papers Numbered

Notice of Motion/& exs..... 1-7

Answering Affidavits 8-9

Replying Affidavits 10

Upon the foregoing papers it is ordered that this motion by defendant for dismissal of the complaint is granted.

Although movant cites only CPLR 3211(a)7, the Court has considered the impact of CPLR 3211(a)2 despite the movant's failure to cite that subdivision.

Despite plaintiff's adjectival and adverbial embellishment of the first cause of action, the fraudulent characterization of defendant's alleged violation of the consent order of the U. S. District Court (E.D.Pa.) must be viewed as merely accidental rather than substantial. The essence of the cause of action remains defendant's alleged non-compliance with the terms of the decree.

As indicated by Judge Brieant in dismissing an earlier action commenced by plaintiff in the U. S. District Court for the Southern District of New York:

> "Necessary proceedings, if any, to enforce the 'Consent Decree' of the United States District Court for the Eastern District of Pennsylvania * * * should be taken in that Court."

That determination was clearly consistent with the long-standing rule that "(i)t is primarily for the court which issued an injunction to determine its meaning and whether the conduct complained of is a violation of it. (*Matter of New York & Westchester Town Site Co.*, 145 App Div 630)". (*Matter of Rothko*, 84 Misc 2d 830, 863, modified on other grounds 56 AD 2d 499, affirmed 43 NY 2d 305). The first cause of action is, therefore, not properly before this Court.

The second cause of action fails because of its total dependence upon the first and further, because there is no separate cause of action for punitive damages (*Kelly* v *CBS, Inc.*, 59 AD 2d 686; *Thaler* v *North River Insurance Company*, 63 AD 2d 921).

There is no basis in law or in fact for plaintiff's claim that she has been deprived of a hearing to which she was allegedly entitled. The third cause of action is, therefore, legally insufficient.

Dated ———— /s/ Hon. Henderson W. Morrison
J.S.C.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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83 Civ. 3114 (KTD)

ADELINA F. CICIRELLO,
Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,
Defendant.

MEMORANDUM & ORDER

APPEARANCES:

JACOB RABINOWITZ, ESQ.
Attorneys for Plaintiff
535 Fifth Avenue
New York, New York 10017
Of Counsel: Sol Mermelstein, Esq.

MICHAEL HERTZBERG, ESQ.
Attorney for Defendant
1095 Avenue of the Americas
New York, New York 10036

KEVIN THOMAS DUFFY, D.J.:

Plaintiff, Adelina F. Cicirello, brought this action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.* ("Title VII"), alleging that defendant, New York Telephone Company ("Telco"), retaliated against her because she had filed sex discrimination charges with the Equal Employment Opportunity Commission ("EEOC") and had commenced two prior actions against Telco. Telco moves for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Pro-

cedure. Cicirello opposes Telco's motion and further asks for an order requiring Telco to comply with her discovery requests. For the reasons set forth below, Telco's motion for summary judgment is granted.

FACTS

A. Prior EEOC Proceedings and Actions

Cicirello, who had been an employee with Telco for over thirty years, brought her first action against Telco in this court in March 1981. In that action, Cicirello alleged that Telco had (1) violated an expired 1974 Consent Decree of the United States District Court for the Eastern District of Pennsylvania, and (2) discriminated against her because of her sex. Judge Brieant dismissed the action because (1) an attempt to enforce the Consent Decree could be brought only in the Eastern District of Pennsylvania, and (2) Cicirello had never filed a sex discrimination charge with the EEOC and therefore failed to meet the court's jurisdictional requirements. *Cicirello v. New York Telephone Co.*, Telco's Memorandum of Law In Support Of Defendant's Motion for Summary Judgment, Exh. A (Endorsement, 81 Civ. 1493, June 19, 1981).

Cicirello then filed a charge with the EEOC on February 5, 1982, alleging that Telco had discriminated against her because of her sex. After receiving from the EEOC a Notice of Right to Sue, Cicirello failed to commence a discrimination action within ninety days and thus forfeited her right to bring an action for discriminatory conduct allegedly occurring prior to February 5, 1982.

Finally, in June 1982, Cicirello commenced an action in New York Supreme Court, Nassau County, claiming that Telco had fraudulently violated the expired 1974 Eastern District of Pennsylvania Consent Decree. The court dismissed the action for the same reason Judge Brieant dismissed the first action.

B. This Action

On October 1, 1982, after being informed by Telco that she was going to be demoted and transferred to the company's Hempstead office on October 3, 1982, Cicirello became ill and left work. She then exhausted the fifty-two weeks of company disability benefits to which she was entitled and was immediately retired on a service pension effective October 10, 1983.

On October 11, 1982, while receiving disability benefits and prior to her retirement, Cicirello filed a second charge with the EEOC, this time alleging that Telco had unlawfully retaliated against her for her filing of the February 5, 1982 sex discrimination charge. On January 25, 1983, the EEOC issued a determination stating that "[e]xamination of the evidence in the record indicates that there is not reasonable cause to believe that this allegation is true." Telco's Answer, Exh. D. On this date, the EEOC also issued a Notice of Right to Sue with regard to the matters raised in the retaliation charge. Based on this Notice of Right to Sue, in April, 1983 Cicirello commenced the instant action.

Cicirello alleges that in retaliation for filing EEOC charges and commencing actions Telco, *inter alia*, continually intimidated and harassed her, unjustily demoted and transferred her, and gave her harsh and unfair evaluations. Cicirello seeks (1) a declaratory judgment that the complained of acts, policies, practices and procedures of Telco are discriminatory and unlawful employment practices in violation of Title VII; (2) equitable and injunctive relief to correct the conditions complained of; (3) all back wages, lost fringe benefits, and monetary damages resulting from Telco's practices; and (4) all of the costs of this action.

DISCUSSION

A summary judgment motion will not be granted if there exists a genuine issue as to any material fact. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Furthermore, it is the movant's burden to establish that no disputed material fact exists and that it is entitled to judgment as a matter of law. *Id.* For the following reasons, I find that Telco has met its burden of proof and as a matter of law is entitled to summary judgment.

For the purposes of Telco's motion for summary judgment, the most significant issue is whether Cicirello was in fact demoted from Management Assistant to Service Assistant on October 1, 1982. It is undisputed that on October 1, 1982, Cicirello was informed by Telco that she was to be demoted to the position of Service Assistant and transferred to the company's Hempstead office on October 3, 1982. Affidavit of Charles Swetz ¶ 5. Cicirello argues that she was demoted when she was notified of the personnel action. Telco, however, asserts that the demotion never became effective because Cicirello's absence due to her disability began on October 1, 1982 and she retired immediately thereafter. Furthermore, Telco has provided overwhelming proof tending to show that Cicirello was not demoted on October 1, 1982.

First, Cicirello admits that Telco did not officially change her job title as of October 1, 1982. Supplementary Affidavit of Adelina F. Cicirello, at 2. Company records also uniformly reflect that after October 1, 1982, Cicirello retained her Management Assistant title.[1] Second, Cici-

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[1] Cicirello's Employee Service Record shows that as of the date of the last entry, posted on October 22, 1983, her job title remained Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. A. This Service Record, which reflects all payroll changes affecting Cicirello from 1974 through the date of her retirement in 1983, contains no entry in 1982 regarding any demotion of Cicirello or reduction in her pay rate despite the fact that her prior demotion and salary reduction in 1978 is reflected in the document. In addition, a Bell System Employee Injury and Illness Report which was filled out over two months after Cicirello's alleged demotion still shows her job title as Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. B.

The computerized calculation of her pension, dated October 17, 1983, shows that Cicirello's pension payments were based on her

rello admits that her salary was never reduced as of October 1, 1982, or any subsequent date. *Id.* Third, Cicirello does not deny that her disability benefits and pension payments were based on her salary as a Management Assistant.

Consequently, it is clear that the effective date of Cicirello's demotion was to be October 3, 1982 but that she left before then. Thus, Cicirello's claim that Telco retaliated against her by demoting and transferring her is wholly without support and Telco's motion for summary judgment dismissing this claim is granted.

Cicirello alleges also that Telco retaliated against her by intimidating and harassing her, giving her a "G-minus" evaluation, and threatening her with dismissal. The issue arises whether Cicirello's retirement has rendered these claims moot.

The Supreme Court has frequently stated that "federal courts are without power to decide questions that cannot affect the rights of litigants in the case before them." *North Carolina v. Rice*, 404 U.S. 244, 246 (1971); *see also Oil Workers Union v. Missouri*, 361 U.S. 363, 367 (1960). It is evident that "[t]he rule in federal cases is that an actual controversy must be extant at all stages of review, not merely at the time the complaint is filed." *Steffel v. Thompson*, 415 U.S. 452, 459n.10 (1974).

It is not disputed that Cicirello was paid all of her fifty-two weeks of eligibility for disability benefits. Nor

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salary as a Management Assistant. Supplementary Affidavit of Michael Hertzberg, Exh. C. Indeed, Cicirello's annual pay at retirement is shown as $26,400, which is higher than her $25,550 salary as of October 1, 1982. This is because, in accordance with Telco's pension plan, salary increases which are withheld during periods of disability are credited to employees for purposes of pension calculations. Supplementary Affidavit of Michael Hertzberg, ¶ 5(d).

is it disputed that she has remained totally disabled for work since that time.[2] Consequently, at the least, Cicirello can no longer be considered an active employee of Telco.[3] In addition, based on the papers submitted, there can be no reasonable expectation that Cicirello will resume employment with Telco and that Telco will have an occasion to take any action, retaliatory or otherwise, against Cicirello.

With respect to Cicirello's prayer for declaratory relief in particular, given the severance of Cicirello and Telco's employment relationship, it would be inappropriate for this court to issue a declaratory judgment or any other form of injunctive or equitable relief. "For a declaratory judgment to issue, there must be a dispute which 'calls, not for an advisory opinion upon a hypothetical basis, but for an adjudication of present right upon established facts.'" *Ashcroft v. Mattis*, 431 U.S. 171, 172 (1977) (per curiam), quoting *Aetna Life Ins. Co. v. Haworth*, 300 U.S. 227, 242 (1937). As Cicirello

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[2] Telco characterizes Cicirello as being "retired." Cicirello, alternatively, argues that her "retirement was effected" by Telco unilaterally and that this should not have been done. Whether Cicirello's contention is true or not is irrelevant because it is undisputed that she is presently unable to work and she has given no indication that she will be able to work in the near future.

[3] At the most, Telco was entirely justified in retiring Cicirello. It is Telco's routine and uniform policy to retire a disabled employee on a service pension if the employee qualifies for such treatment. Telco's Employee Benefits Administrative Guide specifically provides: "Employees with fifteen or more years of service who exhaust benefits will, if disability continues, be treated as pension cases, and handled in accordance with Part IV of this Guide [Retirement and Pensions]." Supplementary Affidavit of Michael Hertzberg, ¶ 6. Although Cicirello complains that Telco should not have unilaterally effected her retirement, she proposes no viable alternative. After her one year sickness absence, Cicirello remained totally disabled and could no longer receive disability benefits. As a result, Telco's only choice was to retire Cicirello and provide her with a pension.

is no longer an employee of Telco, her request for a declaratory judgment is, in actuality, a request for an advisory opinion, and must therefore be denied. Furthermore, injunctive relief in this case would also be meaningless given that there is no longer a continuing employment relationship between the parties.

Finally, Cicirello's claim for compensatory damages resulting from "humiliation, embarrassment and mental stress," Complaint ¶ 16, must also be dismissed. It is a widely held rule that "[d]amages for individual losses are not recoverable under a Title VII claim." [4] *Davidson v. Yeshiva University*, 555 F. Supp. 75, 80 (S.D.N.Y. 1982); *see, e.g., Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. 366, 374-75 (1979); *Johnson v. Georgia Highway Express*, 417 F.2d 1122, 1125 (5th Cir. 1969); *Smith v. Hampton Training School for Nurses*, 360 F.2d 577, 581 (4th Cir. 1966) (en banc). Accordingly, Telco's motion for summary judgment is granted and Cicirello's request for an order requiring Telco to comply with her discovery requests is denied as moot.

SO ORDERED.

DATED: New York, New York
October 10, 1984

KEVIN THOMAS DUFFY, U.S.D.J.

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[4] Cicirello claims to have lost backpay. If this were true, it would be recoverable under Title VII. *See Great American Federal Savings & Loan Association v. Novotny*, 442 U.S. at 374 ("[Title VII] provides for injunctive relief, specifically including backpay relief."). However, Cicirello does not claim that her salary or her benefits were ever reduced by Telco and thus any claim for backpay is patently unjustified.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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81 Civ. 1493 (CLB)

ADELINA F. CICIRELLO,

Plaintiff,

-against-

NEW YORK TELEPHONE COMPANY,

Defendant.

AFFIDAVIT IN OPPOSITION

STATE OF NEW YORK,)
) ss.:
COUNTY OF NEW YORK)

ADELINA F. CICIRELLO, being duly sworn, deposes and says:

I am the plaintiff in the within action and submit this affidavit in opposition to defendant's motion to dismiss my complaint previously served upon them. I refer the Court to the Memorandum of Law submitted herewith and prepared by my attorney for the legal basis of my argument. This affidavit will concern itself with the facts incident to the matter and my cause of action.

WORK HISTORY AND FACTUAL BASIS TO CLAIM.

I have been a faithful employee of the defendant for thirty years. By reason of my performance during the early and mid-portions of my employment, I was raised to managerial level in and around May, 1969.

During the mid to late seventies, I failed to receive proper and usual salary raises and merit increases by reason of what I now claim in my complaint to be a course of conduct by the defendant to evade the effect of a consent decree entered into between defendant and its affiliated companies in or around 1974. A copy of the Consent Decree entered into in the District Court of Pennsylvania is annexed to a copy of the complaint, both documents annexed to the primary moving papers submitted by defendant.

I refer the Court to an examination of the general allegations of discrimination outlined in my complaint. At this posture, I will briefly discuss the specifics concerning my claim.

As in many bureaucratic large corporate structures, salary increases granted by the defendant are determined by a rating system and various levels. During 1975, I was unusually placed at a "G minus" salary rating instead of the G salary level that I had been operating at for most of my employment career with the phone company. Coincidentally, I had not received a cost of living salary increase for two years prior thereto. It is coincidental because the time frame coincides with the discrimination action which gave rise to the aforementioned Consent Decree.

In November of 1975, and in the course of my managerial duties, I issued a caution to an operator, said caution mandated by the operator's actions. Said operator complained to my supervisor who requested that I remove the caution. I was threatened with retaliatory action if I did not remove it from the employee's record. Shortly thereafter, I was given a "G minus" rating which I firmly believe was attributable solely to the above named incident. It is interesting to note that this rating was based on a mere three month period although I had been in this managerial position for ten months.

I disputed the rating, but my supervisor refused to discuss the issue or change it. I was told that there would be a new rating and evaluation within six months. Needless to say, in December, 1976, after about eight months, I sought a new evaluation, but was deliberately delayed; all by reason of their alleged plan to keep my salary at the lowest level possible.

Finally, after fourteen months, my supervisor gave me a "U" rating. From its very sound, it was of course a harsh commentary on my work. After extensive talks, the appraisal was changed to a "G minus", but I was not given any salary increase for merit or cost of living.

In May, 1978, I again received an unsatisfactory rating and attempted to discover the reasons thereof by speaking to the Division Manager. I was "stonewalled". As was the case with my previous ratings, I had no opportunity or procedure to seek review of these ratings. I could not turn to a impartial third party for neutrality. The only parties giving the ratings were the supervisors who actually participated in the review process.

Finally, in December of 1978 after being demoted, I was loaned by the defendant to the National Alliance of Business, an outside company who utilizes some of the phone company's employees.

As implied by the bringing of my action, I am not one to sit by in the face of such harsh treatment. I firmly believed that something was up and by this time consulted with my attorney to investigate this matter. It was at this time, early 1979, that I first learned of the Consent Decree, and only after the writing of numerous letters by your deponent and my attorney. I felt that something was amiss because for six years prior to the time that I started receiving the unsatisfactory ratings, I had received a "G" rating which is deemed satisfactory. I reiterate that it is highly coincidental that the unsatis-

factory ratings started in and around the time of the entry of the Consent Decree. By giving the unsatisfactory ratings, the defendant managed to keep me at a low management level preventing me from obtaining the benefits outlined for me and others similarly situated in the Consent Decree.

The gravaman [*sic*] of my complaint revolves around the defendant's action in doing those things necessary to prevent me from obtaining my proper salary in line with their promises outlined in the Decree. I therefore was not given equal pay and equal treatment. I believe I was the subject of unusually harsh rating systems, and upon questioning same, I was denied the right to a fair hearing and review with respect to my ratings.

I had no full knowledge of the Consent Decree and provisions contained therein until in and around the Summer of 1979. I was directly affected and covered by the Decree and by the terms of the Decree itself, Subdivision 2, the American Telephone and Telegraph Company and its affiliates were to fully advise all covered persons of the terms of the Decree. This was never done in my case.

FUTILITY OF ADMINISTRATIVE PROCEDURES.

I and my attorney both knew of the existence of the Equal Opportunity Employment Commission (EEOC) and that there are certain administrative procedures which must be followed prior to the institution of an actual lawsuit. I and my attorney, in and around the time of the learning of the existence of the Consent Decree in 1979, started writing letters and making requests of the EEOC and other agencies. I annex hereto and mark as Exhibit A a series of letters by myself, my attorney, and responses thereto which clearly indicate how I have been frustrated in attempting an administrative grievance procedure.

An examination of the letters will show that both the letters and my complaint were shuffled around from agency to agency. The United States Department of Labor referred me to the EEOC. I was further referred to the Solicitor of Labor who then later, again, referred me to the EEOC. The last two letters, dated 1981, again referred me to the EEOC for the filing of a claim. This is most interesting and unusual because, as will hereinafter be set forth and as explained in the accompanying affidavit by Daniel D. Abramtsov, Esq., I made a specific attempt at filing a claim with the EEOC, all to no avail.

In the early part of 1980, realizing that I had to file a charge with the EEOC, I visited the offices of that agency located at 90 Church Street, New York, New York. I met with a person in charge of taking information for claims. She requested further information subsequently supplied to her by my attorney. After a period of time had passed, my attorney contacted her and she called him back. EEOC could do nothing for her.

Failing to believe the truth of this, I personally requested a meeting with Mr. Mercado, the District Director of said agency. I fully explained to him the facts and my claims of discrimination. After a lengthy conference dated 6/80/80 [*sic*], he explained that his agency could do nothing for me and even referred me to the National Labor Relations Board. He failed to give me a "right to sue" letter or any other document, but merely explained that his agency could not help me.

It is clearly shown that I have made every attempt possible to exhaust administrative procedures in an effort to resolve my claim of discrimination. I have been met with frustration, and by reason of the futility in further seeking such administrative help, such frustration and futility having extended over a period of one and one-half years, it was necessary to bring the within action.

THE COMPLAINT AND THE INSTANT MOTION.

The attorneys for defendant did not attack the substance of my allegations, but wish to dismiss my complaint on procedural grounds. It is true that I did not receive a "right to sue" letter, but as demonstrated in the accompanying Memorandum of Law, such is not always necessary. Furthermore, by reason of the fact that I was clearly a party intended to benefit from the Consent Decree, I must be deemed a third party beneficiary of the contract and my contract claim and my claim of fraud for failing to fully advise me of the Consent Decree, cannot and must not be dismissed.

As for the Statutory Title 7 claim of discrimination, it is respectfully requested that the Court acknowledge my frustration involved in the fact that Mr. Mercado and the EEOC did not give me a "right to sue" letter even after attempting to file a claim. However, in the alternative, if this Court decides that the said procedural failure of having received such a letter from the agency, based on all the facts as set forth herein, is sufficient grounds to dismiss my Title 7 claim, it is requested that the Court grant me leave to amend my complaint to allege violations of my rights reserved to other pertinent Civil Rights sections, such as Section 1981, Section 1982 and the like. I am advised by my attorney and I verily believe it to be true that leave to amend is freely given and the defendant can suffer no prejudice because their motion seeks to dismiss my complaint on mere technicalities, and not on the substance and merits.

I state with no reservation that it is my firm belief that I have been discriminated against by the defendant. Substance should win out over form. The defendant's motion should be denied or I be given leave to replead within this Court, the district wherein the defendant maintains its principal place of business and in this State wherein both parties reside.

WHEREFORE, for all of the foregoing reasons, it is respectfully requested that the Court deny defendant's motion in all respects.

/s/ Adelina F. Cicirello
ADELINA F. CICIRELLO

Sworn to before me this 9th day of June, 1981.

/s/ Daniel D. Abramtsov
Notary Public